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Suresh Kumar a/l Velayuthan v Public Prosecutor

B HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO WA-44–337–12 OF 2019
COLLIN SEQUERAH J
17 FEBRUARY 2020

C *Constitutional Law — Constitution — Infringement of — Whether s 13 of the Security Offences (Special Measures) Act 2012 ('the SOSMA') unconstitutional — Whether Legislature could enact to prevent court from exercising its discretion to grant bail — Separation of power — Whether doctrine of separation of powers integral part of Constitution — Whether doctrine of separation of powers integral part of Constitution — Whether there was any basis for exercise of judicial discretion in respect of bail in case of those persons charged with offences relating to terrorism under s 13 of the SOSMA — Equality before law — Whether s 13 of the SOSMA passes ultimate test of proportionality — Whether s 13 of the SOSMA offends principle of equality enshrined in art 8 of the FC — Principle of maxim 'generalia specialibus non derogant' — Whether bail provision in s 13 of the SOSMA was meant to prevail over more general provisions of bail in s 388 of the CPC*

F Suresh Kumar a/l Velayuthan ('the accused') was charged under ss 130J and 130JB of the Penal Code for providing support to a terrorist group referred to as the Liberation Tigers of Tamil Elaam ('LTTE') and for possessing items relating to the LTTE. While both these sections of the Penal Code create substantive offences, they are procedurally governed by the Security Offences (Special Measures) Act 2012 ('the SOSMA'). Section 13 of the SOSMA absolutely prohibits bail for offences relating to terrorism. Despite the absolute prohibition, this was an application by the accused for bail pending trial. The accused argued that s 13 of the SOSMA was unconstitutional and therefore ultra vires art 121 of the Federal Constitution ('the FC'). In reliance on the decision in *Saminathan a/l Ganesan v Public Prosecutor* ('*Ganesan*'s case'), the accused argued that since the power to grant bail was a judicial power, the Legislature could not enact to prevent the court from exercising its discretion to grant bail. The prosecution agreed with the accused that s 13 was unconstitutional but it argued that the accused should be denied bail based on the merits of his application.

Held, dismissing the bail application:

(1) The powers of the court derive from the Constitution and not merely from federal law. Accordingly, there can be no dispute that, the courts are vested with jurisdiction or judicial power to declare a provision of legislation passed as unconstitutional. *Ganesan*'s case proceeded from the premise that the power to consider the grant or refusal of bail was an exercise of judicial power. However, the exercise of judicial power does not begin until and unless the court was called upon to exercise such power. In s 13 of the SOSMA, which concerns persons charged with offences relating to terrorism, the court was simply not called upon to take any action. This was because the foundation or substratum for the exercise of that power was not there in the first place. It was axiomatic therefore, that a substratum of laws must first exist before the edifice of judicial authority may be erected thereupon for otherwise, the question of removing judicial power does not arise. Therefore, although the principle to be enunciated from *Ganesan*'s case is that any legislation that seeks to remove from the courts any judicial power cannot be countenanced as this would be wholly inimical to the doctrine of the separation of powers, this could not hold true where there was no substratum or foundation laid for the exercise of such power. Under all the circumstances, there was no basis or foundation for the exercise of judicial discretion in respect of bail in the case of those persons charged with offences relating to terrorism under s 13 of the SOSMA (see paras 30–33 & 69–74).

(2) The separation of powers doctrine operates as a necessary check and balance between the three branches of government so that one branch does not encroach upon the powers of the other and every organ keep within its proper confines and limits. Therefore, in as much as it was the function of the Judiciary to interpret laws, it is also as much a function of the Legislature to pass laws. However, the court by declaring a particular law unconstitutional where no substratum to exercise a discretion amounting to judicial power was given in the first place, may itself be transgressing against the limits and boundaries implicit in the FC; and in so transgressing encroaches into the power of law-making by the Legislature and consequently offending the separation of powers doctrine. It is trite that there was a presumption of constitutionality in every legislation passed by Parliament. The burden therefore rests upon the party seeking to displace that presumption. At this point, it was important to bear in mind that the SOSMA was a piece of adjectival law and does not create a substantive offence and that it was enacted pursuant to art 149 of the FC. Thus, although art 4(1) of the FC, gives the court the power to strike down any law which inconsistent with the Constitution, such a law may be struck down as void only if it is inconsistent with the FC. Since SOSMA was enacted pursuant to art 149 which stipulates that the passing of any law was valid notwithstanding

that it is inconsistent with any of the provisions of arts 5, 9, 10 or 13 which relate to certain fundamental liberties, the provisions of the SOSMA are therefore valid. It logically follows then, reading the provisions of the FC in a harmonious fashion, that the provisions of the SOSMA in particular s 13 are valid and are not ultra vires art 121(1) of the FC (see paras 77–78, 81–84 & 87–95).

(3) The curtailment of freedom by the absolute prohibition of bail in s 13 is not out of proportion to the object of the SOSMA, which is the prevention of action prejudicial to public order in, or the security of, the Federation or any part thereof. The enactment of s 13 of the SOSMA passes the ultimate test of proportionality and does not offend the principle of equality enshrined in art 8 of the FC and was consequently not ultra vires art 8 of the FC (see paras 99, 102–103 & 110)

(4) If the arguments advanced by the parties are correct and s 13 of the SOSMA was ultra vires art 121(1) of the FC and therefore unconstitutional, this would mean that any application for the grant of bail would have to fall back under s 388 of the Criminal Procedure Code ('the CPC'). The effect of this contention however, would be to ignore the maxim, 'generalia specialibus non derogant', which means that a general Act was made subject to a specific Act. It was therefore the clear and manifest intention of Parliament that the bail provision in s 13 SOSMA was meant to prevail over the more general provisions of bail in s 388 of the CPC. It follows therefore that it is s 13 of the SOSMA that was applicable to offences under that Act and not the provisions of the CPC when it comes to bail. In the circumstances, the provision in s 13 of the SOSMA that absolutely prohibits bail for persons charged with an offence under Chapter VIA of the Penal Code which relates to terrorism and under which the accused stands charged, was constitutional and not ultra vires art 121(1) or art 8 of the FC (see paras 130–131, 133–135 & 139).

[Bahasa Malaysia summary

Suresh Kumar a/l Velayuthan ('tertuduh') telah di tuduh dibawah ss 130J dan 130JB Kanun Keseksaan untuk memberi sokongan kepada satu kumpulan pengganas yang dirujuk sebagai Liberation Tigers of Tamil Elaam ('LTTE') untuk memiliki barang berkaitan dengan LTTE. Atas sebab kedua-dua seksyen ini mewujudkan kesalahan substantif, ianya tertakluk dibawah Akta Kesalahan Keselamatan (Langkah-Langkah Khas) 2012 ('Akta'). Seksyen 13 Akta melarang secara mutlak ikat jamin bagi kesalahan berkaitan dengan pengganas. Walaupun larangan mutlak tersebut, wujud satu permohonan daripada tertuduh untuk diberikan ikat jamin sementara menantikan perbicaraan. Tertuduh menghujahkan bahawa s 13 Akta melanggar Perlembagaan Persekutuan dan oleh itu ultra vires perkara 121 Perlembagaan Persekutuan ('Perlembagaan'). Dengan bergantung kepada keputusan dalam kes

Saminathan a/l Ganesan v Public Prosecutor ('kes *Ganesan*'), tertuduh menghujahkan bahawa memandangkan kuasa untuk memberikan ikat jamin adalah kuasa mahkamah, Badan Perundangan tidak boleh membuat undang-undang untuk menghalang mahkamah dari menggunakan budi bicaranya untuk meberikan ikat jamin. Pendakwaan bersetuju dengan tertuduh bahawa s 13 adalah melanggar Perlembagaan Persektuan tetapi menghujahkan bahawa tertuduh harus dinafikan ikat jamin berdasarkan merit permohonannya.

Diputuskan, menolak permohonan ikat jamin:

(1) Kuasa mahkamah berasaskan Perlembagaan dan bukan sahaja dari undang-undang persekutuan. Oleh itu, tiada perbalahan bahawa, mahakmah diberikan dengan bidang kuasa dan kuasa kehakiman untuk mengisytiharkan satu peruntukkan undang-undang yang diluluskan sebagai bercanggah dengan Perlembagaan Persekutuan. Kes *Ganesan* diteruskan atas premis bahawa mahakamh untuk menimbangkan sama ada ikat jamin diberikan atau ditolak adalah satu penggunaan kuasa kehakiman. Namun, penggunaan kuasa penghakiman tidak bermula sehingga mahkamah dipanggil untuk menggunakan kuasa tersebut. Dalam s 13 Akta, yang melibatkan individu yang dituduh dengan kesalahan berkaitan dengan pengganas, mahkamah tidak dipanggil untuk mengambil apa-apa tindakan. Ini adalah kerana asas atau *substratum* untuk penggunaan kuasa tersebut tidak wujud pada permulaannya. Oleh itu, ianya tidak dapat disangkal bahawa satu *substratum* undang-undang haruslah wujud sebelum otoriti kehakiman boleh diwujudkan, jikalau tidak, persoalan untuk mengeluarkan kuasa kahakiman tidak timbul. Oleh itu, walaupun prinsip yang dinyatakan dari kes *Ganesan* adalah apa-apa undang-undang yang cuba untuk mengeluarkan dari mahkamah apa-apa kuasa kehakiman tidak boleh dicabar kerana ini adalah memudaratkan kepada doktrin pengasingan kuasa, dan ini tidak boleh dijadikan sebagai benar apabila tiada *substratum* atau asas untuk pengunaan kuasa sedemikian. Di dalam semua keadaan, tiada asas atau alasan untuk penggunaan kuasa kehakiman berkaitan dengan ikat jamin dalam kes orang yang dipertuduhkan dengan kesalahan berkaitan dengan pengganas dibawah s 13 Akta (lihat perenggan 30–33 & 69–74).

(2) Doktrin pengasingan kuasa berfungsi sebagai satu semak dan imbang yang perlu antara tiga cabang kerajaan agar satu bahagian tidak mencerobohi keatas kuasa yang lain dan setiap satu cabang kekal berada didalam kawasan dan had masing-masing. Oleh itu, sebagaimanapun adalah fungsi badan kehakiman untuk menafsir undang-undang, adalah juga fungsi badan perundangan untuk meluluskan undang-undang. Namun, apabila mahakmah mengisytiharkan satu undang-undang sebagai melanggar Perlembagaan Persekutuan apabila tiada *substratum*

untuk menggunakan budi bicara yang terjumlah kepada kuasa kehakiman diberikan pada mulanya, mungkin dengan sendirinya melanggar terhadap had dan sempadan yang dinyatakan dalam Perlembagaan; dan dengan melanggar telah mencerobohi kuasa membuat undang-undang oleh badan perundangan. Adalah mantap bahawa wujud anggapan kepatuhan dengan Perlembagaan Persekutuan dalam semua undang-undang yang diluluskan oleh Parlimen. Beban oleh itu terletak pada pihak yang cuba untuk mengetepikan anggapan tersebut. Pada waktu ini, adalah penting untuk mengingati bahawa Akta adalah satu undang-undang adjektif dan tidak mewujudkan kesalahan substantif dan ianya diwujudkan selaras dengan perkara 149 Perlembagaan. Oleh itu, walaupun perkara 4(1) Perlembagaan, memberikan mahkamah kuasa untuk membatalkan apa-apa undang-undang yang tidak selaras dengan Perlembagaan, undang-undang tersebut boleh dibatalkan sebagai tidak sah hanya sekiranya ianya tidak konsisten dengan Perlembagaan. Memandangkan Akta diwujudkan selaras dengan perkara 149 yang menyatakan bahawa kelulusan apa-apa undang-undang yang tidak selaras dengan perkara 5, 9, 10 atau 13 yang berkait dengan kebebasan asas, peruntukkan Akta adalah oleh itu sah. Adalah munasabah bahawa, pembacaan peruntukan Perlembagaan secara harmoni, bahawa peruntukan Akta, terutamanya s 13 adalah sah dan tidak ultra vires perkara 121(1) Perlembagaan (lihat perenggan 77–78, 81–84 & 87–95).

(3) Pengurangan kebebasan dengan larangan untuk memberikan ikat jamin dalam s 13 adalah seimbagan dengan matlamat Akta, yang mana adalah untuk mengelakkan tindakan yang bertentangan dengan ketenteraman awam dalam, atau keselamatan persekutuan, atau sebahagian daripadanya kewujudan s 13 Akta meluluskan ujian perkadaran dan tidak melanggar prinsip kesamarataan yang dilindungi di dalam perkara 8 Perlembagaan dan oleh itu tidak melanggar perkara 8 Perlembagaan (lihat perenggan 99, 102–103 & 110).

(4) Sekiranya hujahan yang dikemukakan oleh pihak-pihak adalah betul dan s 13 Akta adalah ultra vires perkara 121(1) Perlembagaan dan oleh itu melanggar Perlembagaan, ini akan bermaksud bahawa apa-apa permohnan untuk memberikan ikat jamin akan kembali kepada s 388 Kanun Tatacara Jenayah ('KTJ'). Kesan dari ini adalah, akan tidak menghiraukan prinsip 'generalia specialibus non derogant', yang bermaksud bawah satu Akta am yang dibuat tertakluk kepada Akta spesifik. Oleh itu, adalah jelas niat Parliamen bahawa peruntukan ikat jamin dalam s 13 Akta berniat untuk mengatasi peruntukan am berkaitan ikat jamin dibawah s 388 KTJ. Oleh itu, s 13 Akta adalah terpakai untuk kesalahan dibawah Akta tersebut dan bukannya peruntukan KTJ apabila berkaitan dengan ikat jamin. Dalam keadaan ini, peruntukan s 13 Akta yang secara mutlak tidak membenarkan ikat

jamin untuk individu yang dipertuduhkan dengan kesalahan dibawah Bab VIA Kanun Keseksaan yang berkaitan dengan keganasan dan dibawah mana tertuduh dipertuduhkan adalah sah disisi undang-undang dan tidak ultra vires perkara 121(1) atau perkara 8 Perlembagaan (lihat perenggan 130–131, 133–135 & 139)]

Cases referred to

Alma Nudo Atenza v PP and another appeal [2019] 4 MLJ 1, FC (refd)
Chinnakarappan v PP [1962] 1 MLJ 234 (refd)
Chow Lin Choy lwn Pendakwa Raya [2010] 9 MLJ 813, HC (not folld)
Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545, FC (refd)
Jimmy Seah Thian Heng & Ors v PP [2019] 7 MLJ 308; [2018] 6 AMR 345, HC (refd)
Lee Kwan Woh v PP [2009] 5 MLJ 301, FC (refd)
Om Kumar & Ors v Union of India AIR 2000 SC 3689, SC (refd)
Ooi Kean Thong & Anor v PP [2006] 3 MLJ 389, FC (refd)
PP v Chew Siew Luan [1982] 2 MLJ 119, FC (refd)
PP v Dato' Yap Peng [1987] 2 MLJ 311, SC (refd)
PP v Datuk Harun bin Haji Idris & Ors [1976] 2 MLJ 116 (refd)
PP v Kok Wah Kuan [2008] 1 MLJ 1, FC (folld)
PP v Latchemy [1967] 2 MLJ 79 (refd)
PP v Pung Chen Choon [1994] 1 MLJ 566, SC (refd)
Saminathan a/l Ganesan v PP [2020] 7 MLJ 681; [2020] 1 LNS 31, HC (not folld)
Savrimuthu v PP [1987] 2 MLJ 173, SC (refd)
Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case [2017] 3 MLJ 561, FC (folld)
Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 30
Criminal Justice Ordinance
Criminal Procedure Code ss 3, 388, 388(1), 418A
Dangerous Drugs Act 1952 ss 37A, 39B, 39B(2), 41A, 41B, 41B(1), 41D
Federal Constitution arts 4, 4(1), 5, 8, 8(1), 9, 10, 13, 121, 121(1), (1A), 149, 149(1)(f), 160(2)
Firearms (Increased Penalties) Act 1971
Kidnapping Act 1961
Land Acquisition Act 1960 s 40D
Penal Code ss 130J, 130JB, 302, Chapter VIA
Security Offences (Special Measures) Act 2012 ss 2, 3, 13, 13(2), First Schedule
Special Measures Against Terrorism in Foreign Countries Act 2015

Ram Karpal Singh (Harshaan Zamani with him) (Karpal Singh & Co) for the applicant.

Tommy Thomas (Aslinda Ahad, Rohaiza Abd Rahman and Mohamad Nurzul b Azuar Zulkifli with him) (Public Prosecutor, Attorney General's Chambers) for the respondent.

Collin Sequerah J:

INTRODUCTION

[1] This an application by the applicant/accused ('accused') for bail pending trial. The accused is charged under s 130J of the Penal Code for providing support to the Liberation Tigers of Tamil Elaam ('LTTE') and under s 130JB of the Penal Code for possessing items relating to LTTE.

[2] These charges read as follows:

> 130J Soliciting or giving support to terrorist groups or for the commission of terrorist acts.
>
> (1) Whoever knowingly and in any manner solicits support for, or gives support to —
>
> (a) any terrorist group; or
>
> (b) the commission of a terrorist act,
>
> shall be punished with imprisonment for life or imprisonment for a term not exceeding thirty years, or with fine, and shall also be liable to forfeiture of any property used or intended to be used in connection with the commission of the offence.
>
> (2) For the purpose of subsection (1), 'support' includes —
>
> (a) an offer to provide, or the provision of, forged or falsified travel documents to a member of a terrorist group;
>
> (b) an offer to provide, or the provision of, a skill or an expertise for the benefit of, at the direction of or in association with a terrorist group;
>
> (c) entering or remaining in any country for the benefit of, or at the direction of or in association with a terrorist group;
>
> (d) becoming a member of a professing membership of a terrorist group;
>
> (e) arranging, managing or assisting in arranging or managing a meeting to further the activities of a terrorist group;
>
> (f) using or possessing property for the purpose of committing or facilitating the commission of a terrorist act;

(g) accumulating, stockpiling or otherwise keeping firearms, explosives, ammunition, poisons or weapons to further the activities of a terrorist group;

(h) arranging, managing or assisting in arranging or managing the transportation of persons to further the activities of a terrorist group;

(i) travelling to, entering or remaining in any foreign country to further the activities of a terrorist group or to commit a terrorist act;

(j) encouraging or inducing any person to leave Malaysia to further the activities of a terrorist group or to commit a terrorist act; or

(k) using social media or any other means to —

(i) advocate for or to promote a terrorist group, support for a terrorist group or the commission of a terrorist act; or

(ii) further or facilitate the activities of a terrorist group.

130JB Possession, etc of items associated with terrorist groups or terrorist acts.

(1) Whoever —

(a) has possession, custody or control of; or

(b) provides, displays, distributes or sells,

any item associated with any terrorist group or the commission of a terrorist act shall be punished with imprisonment for a term not exceeding seven years, or with fine, and shall also be liable to forfeiture of any such item.

(2) In this section —

'item' includes publications, visual recordings, flags, banners, emblems, insignia and any other thing displaying symbols associated with a terrorist group, terrorist act or ideology of a terrorist group;

'publications' includes all written, pictorial or printed matter, and everything of a nature similar to written or printed matter, whether or not containing any visible representation, or by its form, shape or in any other manner capable of suggesting words or ideas, or an audio recording and every copy, translation and reproduction or substantial translation or reproduction in part or in whole thereof.

[3] While both these sections create substantive offences, they are procedurally governed by the Security Offences (Special Measures) Act 2012 ('the SOSMA'). Section 2 of the SOSMA states that the Act shall apply to security offences.

[4] Section 3 of the SOSMA which is the interpretation section states that 'security offences' means the offences specified in the First Schedule thereto. Offences under Chapter VIA of the Penal Code are listed under the First Schedule. Sections 130J and 130JB fall under Chapter VIA of the Penal Code. Chapter VIA concerns (Offences Relating to Terrorism).

[5] Therefore, the provisions of SOSMA are triggered in respect of offences under ss 130J and 130JB of the Penal Code. The relevant section under consideration for present purposes is s 13 of the SOSMA which reads as follows:

> 13 Bail
>
> (1) Bail shall not be granted to a person who has been charged with a security offence.
>
> (2) Notwithstanding subsection (1) —
>
> (a) a person below the age of eighteen years;
>
> (b) a woman; or
>
> (c) a sick or an infirm person,
>
> charged with a security offence, other than an offence under Chapter VIA of the Penal Code [Act 574], and the Special Measures Against Terrorism in Foreign Countries Act 2015 [Act 770] may be released on bail subject to an application by the Public Prosecutor that the person be attached with an electronic monitoring device in accordance with the Criminal Procedure Code.

[6] It will be evident at once that there is a general prohibition on the grant of bail to a person charged for a security offence. The section however creates an exception for the three classes of persons mentioned in sub-s (2).

[7] The section however contains an absolute prohibition on the grant of bail to a person charged with an offence under Chapter VIA of the Penal Code which are offences relating to terrorism.

[8] Previously in *Saminathan a/l Ganesan v Public Prosecutor* [2020] 7 MLJ 681; [2020] 1 LNS 31 by way of reference by the sessions court to the High Court pursuant to s 30 of the Courts of Judicature Act 1964, a question was posed concerning the constitutionality of s 13 of the SOSMA which language absolutely prohibits bail for offences relating to terrorism.

[9] In that case my learned brother Mohd Nazlan Ghazali J held that s 13 of the SOSMA which absolutely prohibits the grant of bail for persons charged with an offence under Chapter VIA of the Penal Code which relates to terrorism is unconstitutional and therefore ultra vires art 121 of the Federal Constitution.

[10] In the course of deciding this application, it now falls upon me to decide whether I am in agreement with the decision of my learned brother or otherwise.

SUBMISSION OF PARTIES

[11] This application took on a most unusual and unprecedented turn and complexion in that the honourable attorney general ('AG') took it upon himself to appear and submit that he was not objecting to the application by the accused in respect of the unconstitutionality of s 13 of the SOSMA.

[12] This meant that both parties adopted a common stand that s 13 of the SOSMA is unconstitutional. The Honourable AG however submitted that whether bail could be granted on the merits would be an altogether different matter.

[13] Both parties also adopted the decision by my learned brother Mohd Nazlan Ghazali J in *Saminathan a/l Ganesan* which held s 13 to be unconstitutional on the main ground that bail is a judicial power and therefore the Legislature cannot enact to prevent the court from exercising its discretion to grant bail.

[14] I wish to also state at the outset that contrary to submissions advanced by both parties, I take the view that being a court of co-ordinate jurisdiction, I do not consider myself bound by my learned brothers decision in *Saminathan a/l Ganesan* and I am therefore at liberty to depart from that decision.

ANALYSIS AND FINDINGS

[15] In the course of deciding whether s 13 of the SOSMA which absolutely prohibits the grant of bail for persons charged with an offence under Chapter VIA of the Penal Code which relates to terrorism is unconstitutional and therefore ultra vires art 121 of the Federal Constitution, it is of course necessary to examine the relevant articles in the Federal Constitution ('the FC').

The Federal Constitution

[16] The basis of the decision of my learned brother in *Saminathan a/l Ganesan* was premised upon the fact that the power to grant bail is a judicial power.

[17] That decision placed reliance substantially upon the case of *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 decided by the Federal Court in respect of art 121 of the Federal Constitution ('the FC') that any prohibition of the exercise of judicial power by the Legislature amounts to a usurpation of a judicial function.

[18] Article 121 in its entirety reads as follows:

121 Judicial power of the Federation

(1) There shall be two High Courts of co-ordinate jurisdiction and status, namely —

(a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and

(b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;

(c) (Repealed).

and such inferior courts as may be provided by federal law and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

(1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.

(1B) There shall be a court which shall be known as the Mahkamah Rayuan (Court of Appeal) and shall have its principal registry at such place as the Yang di-Pertuan Agong may determine, and the Court of Appeal shall have the following jurisdiction, that is to say —

(a) jurisdiction to determine appeals from decisions of a High Court or a judge thereof (except decisions of a High Court given by a registrar or other officer of the Court and appealable under federal law to a judge of the Court); and

(b) such other jurisdiction as may be conferred by or under federal law.

(2) There shall be a court which shall be known as the Mahkamah Persekutuan (Federal Court) and shall have its principal registry at such place as the Yang di-Pertuan Agong may determine, and the Federal Court shall have the following jurisdiction, that is to say —

(a) jurisdiction to determine appeals from decisions of the Court of Appeal, of the High Court or a judge thereof;

(b) such original or consultative jurisdiction as is specified in Articles 128 and 130; and

(c) such other jurisdiction as may be conferred by or under federal law.

(3) Subject to any limitations imposed by or under federal law, any order, decree, judgment or process of the courts referred to in Clause (1) or of any judge thereof shall (so far as its nature permits) have full force and effect according to its tenor throughout the Federation, and may be executed or enforced in any part of the Federation accordingly; and federal law may provide for courts in one part of the Federation or their officers to act in aid of courts in another part.

(4) In determining where the principal registry of the High Court in Sabah and Sarawak is to be, the Yang di-Pertuan Agong shall act on the advice of the Prime Minister, who shall consult the Chief Ministers of the States of Sabah and Sarawak and the Chief Judge of the High Court.

[19] For the purposes of the present discussion, it is sub-art (1) of art 121 that is of particular relevance to the discussion at hand. This was the subject of intense discussion in Semenyih Jaya which delved deep into the reasoning of the majority decision in the case of *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1.

[20] The essence of the majority decision in *Kok Wah Kuan* can best be appreciated by reproducing the relevant passage by Abdul Hamid Mohamad (as His Lordship, later the Chief Justice was then known) as follows:

[7] The Court of Appeal posed two questions for it to answer. They are, first, whether the doctrine of separation of powers is an integral part of the Constitution and, secondly, whether s 97 of the Child Act 'in pith and substance violates the doctrine'. The court, answered the two questions in the affirmative. On the first question, the court held that the amendment to art 121 of the Constitution by Act A704 did not have the effect of divesting the courts of the judicial power of the Federation. The court gave two reasons:

> First, the amending Act did nothing to vest the judicial power in some arm of the Federation other than the courts. Neither did it provide for the sharing of the judicial power with the Executive or Parliament or both those arms of government. Second, the marginal note to art 121 was not amended. This clearly expresses the intention of Parliament not to divest ordinary courts of judicial power of the Federation and to transfer it to or share it with either the Executive or the Legislature.

[8] Let us take a close look at the provision of art 121 of the Constitution before and after the amendment.

[9] *Prior to the amendment, art 121(1) of the Constitution reads*:

> *... the judicial power of the Federation shall be vested in the two High Courts ... and the High Courts ... shall have such jurisdiction and powers as may be conferred by or under federal law.*

[10] *There was thus a definitive declaration that the judicial power of the Federation shall be vested in the two High Courts. So, if a question is asked 'Was the judicial power of the Federation vested in the two High Courts?' The answer has to be 'yes' because that was what the Constitution provided. Whatever the words 'judicial power' mean is a matter of interpretation. Having made the declaration in general terms, the provision went of to say 'and the High Courts ... shall have jurisdiction and powers as may be conferred by or under federal law.' In other words, if we want to know what are the specific jurisdiction and powers of the two High Courts, we will have to look at the federal law.*

[11] *After the amendment, there is no longer a specific provision declaring that the*

A *judicial power of the Federation shall be vested in the two High Courts. What it means is that there is no longer a declaration that 'judicial power of the Federation' as the term was understood prior to the amendment vests in the two High Courts. If we want to know the jurisdiction and powers of the two High Courts we will have to look at the federal law.* If we want to call those powers 'judicial powers', we are perfectly entitled
B to. *But, to what extent such 'judicial powers' are vested in the two High Courts depend on what federal law provides, not on the interpretation the term 'judicial power' as prior to the amendment*. That is the difference and that is the effect of the amendment. Thus, to say that the amendment has no effect does not make sense. There must be. The only question is to what extent? (Emphasis added.)

C

[21] The above passage makes it clear that post the Constitution (Amendment) Act 1988 (Act A704) on 10 June 1988, while there is no dispute that the judicial power of the Federation is vested in the two High Courts because that is what the Constitution provided, what the words 'judicial power'
D mean was said to be a matter of interpretation.

[22] In the final analysis the majority in *Kok Wah Kuan* held that to what extent such 'judicial powers' are vested in the two High Courts depend on what federal law provides and if we want to know the jurisdiction and powers of the
E two High Courts we will have to look at the federal law.

[23] This narrow interpretation of what 'judicial powers' mean was the subject of attack by the Federal Court in *Semenyih Jaya*, the relevant portion of
F which is as follows:

> Judicial power is vested in the courts
>
> [66] In *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2011] 1 MLJ 158, the Federal Court held that *the provision of art 121 of the Constitutionis to be read in connection with its shoulder note (which contains the words 'judicial power') and*
> G *interpreted in this light. The shoulder note in a written Constitution therefore furnishes some clue as to the meaning and purpose of the article* (see also *Kok Wah Kuan (CA) and The Bengal Immunity Company v The State of Bihar and others* AIR 1955 SC 661).
>
> [67] *The legal consequence is that art 121(1) of the Federal Constitution states that judicial power or the power to adjudicate in civil and criminal matters brought to the*
> H *court is vested only in the court*. The same position was adopted in an earlier decision of the Federal Court in the dissenting view of Richard Malanjum CJ (Sabah and Sarawak) in Kok Wah Kuan (FC) and curiously, as did the majority of the Court of Appeal in the same case; *Kok Wah Kuan v Public Prosecutor* (CA).
>
> [68] With respect, *the majority decision of the Federal Court in Kok Wah Kuan (FC)*
> I *appears to have given a narrow interpretation of art 121(1) of the Federal Constitution.* (Emphasis added.)

[24] Two things are immediately apparent from this, firstly, the provision in art 121 must be read and interpreted in conjunction with its shoulder or

marginal note while secondly, this means that judicial power or the power to adjudicate in civil and criminal matters brought to the court is vested only in the court.

[25] Now, at the outset, I must make it as clear as crystal that I am fully in agreement with the ratio of the decision in *Semenyih Jaya* to the effect that the term 'judicial power' means more than what federal law states it is.

[26] It follows that I am also totally in agreement with the minority view in *Kok Wah Kuan* by Richard Malanjum CJ (Sabah and Sarawak) ('as His Lordship subsequently the Chief Justice of Malaysia then was') and adopted by the Federal Court in *Semenyih Jaya* which held:

> [37] At any rate *I am unable to accede to the proposition that with the amendment of art 121(1) of the Federal Constitution (the amendment) the courts in Malaysia can only function in accordance with what have been assigned to them by federal laws. Accepting such proposition is contrary to the democratic system of government wherein the courts form the third branch of the government and they function to ensure that there is 'check and balance' in the system including the crucial duty to dispense justice according to law for those who come before them.*
>
> [38] *The amendment which states that 'the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law' should by no means be read to mean that the doctrines of separation of powers and independence of the Judiciary are now no more the basic features of our Federal Constitution. I do not think that as a result of the amendment our courts have now become servile agents of a federal Act of Parliament and that the courts are now only to perform mechanically any command or bidding of a federal law.*
>
> [39] It must be remembered that the courts, especially the superior courts of this country, are a separate and independent pillar of the Federal Constitution and not mere agents of the federal Legislature. In the performance of their function they perform a myriad of roles and interpret and enforce a myriad of laws. *Article 121(1) is not, and cannot be, the whole and sole repository of the judicial role in this country for the following reasons:*
>
> (i) *The amendment seeks to limit the jurisdiction and powers of the High Courts and inferior courts to whatever 'may be conferred by or under federal law'.* The words 'federal law' are defined in Article 160(2) as follows:
>
> Federal law means —
>
> (a) any existing law relating to a matter with respect to which Parliament has power to make law, being a law continued in operation under Part XIII; and
>
> (b) any Act of Parliament;
>
> (ii) *The courts cannot obviously be confined to 'federal law'. Their role is to be servants of the law as a whole. Law as a whole in this country is defined in art 160(2) to include 'written law, the common law in so far as it is in operation in the Federation or any part*

thereof, and any custom or usage having the force of law in the Federation or any part thereof.

Further, 'written law' is defined in art 160(2) *to include 'this Constitution and the Constitution of any State'. It is obvious, therefore, despite the amendment, the courts have to remain involved in the interpretation and enforcement of all laws that operate in this country, including the Federal Constitution, State Constitutions and any other source of law recognized by our legal system. The jurisdiction and powers of the courts cannot be confined to federal law.*

(iii) Moreover, the Federal Constitution is superior to federal law. The amendment cannot be said to have taken away the powers of the courts to examine issues of constitutionality. *In my view it is not legally possible in a country with a supreme Constitution and with provision for judicial review to prevent the courts from examining constitutional questions*. Along with arts 4(1), 162(6), 128(1) and 128(2), there is the judicial oath in the Sixth Schedule 'to preserve, protect and defend (the) Constitution'.

(iv) With respect *I do not think the amendment should be read to destroy the courts' common law powers. In art 160(2) the term 'law' includes 'common law'. This means that, despite the amendment, the common law powers of the courts are intact* (see *Ngan Tuck Seng v Ngan Yin Hoi* [1999] 5 MLJ 509). *The inherent powers are a separate and distinct source of jurisdiction*. They are independent of any enabling statute passed by the Legislature. On Malaysia Day when the High courts came into existence by virtue of art 121, 'they came invested with a reserve fund of powers necessary to fulfill their function as superior courts of Malaysia'. Similar sentiments were expressed in *R Rama Chandran v The Industrial Court* [1997] 1 MLJ 145. (Emphasis added.)

[27] The above passage in the judgement makes clear the following:

(a) the doctrine of separation of powers and independence of the Judiciary still form part of the basic features of our Federal Constitution;

(b) art 121(1) is not the whole and sole repository of the judicial role in this country;

(c) the term 'law' as defined in art 160(2) is all encompassing and includes common law; and

(d) the inherent powers of the court are a separate and distinct source of jurisdiction.

[28] The basic propositions above enunciated in *Semenyih Jaya* were adopted in subsequent Federal court decisions in *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 and in *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1.

[29] The propositions in *Semenyih Jaya* must reflect the correct position for we do not subscribe to AV Dicey's notion of Parliamentary Supremacy as is the

position that obtains in the United Kingdom. In the Westminster model where there is a written constitution, it is the Constitution that is supreme and an integral part of that Constitution is the principle of separation of powers.

[30] The powers of the court therefore derive from the Constitution and not merely from federal law. See arts 4 and 121 of the FC.

[31] Accordingly, there can be no dispute that, the courts are vested with jurisdiction or judicial power to declare a provision of legislation passed as unconstitutional. See art 4(1) of the FC.

[32] The reservation that I confess to having however is whether this power can be exercised without a proper basis or foundation. I therefore propose to first embark upon an examination of the question of whether there must exist a foundation for the exercise of these judicial powers.

Foundation for the exercise of judicial powers

[33] It is axiomatic that law does not exist in a vacuum. It must rest upon a sure foundation. My learned brother's judgement in *Saminathan a/l Ganesan* proceeded from the premise that the power to consider the grant or refusal of bail is an exercise of judicial power.

[34] In doing so, he relied on the decision of Zakaria Yatim J (as he then was) in *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311, where the term 'judicial power' was discussed as follows.

> Under our Constitution *the words 'judicial power of the Federation' have been defined to mean 'that the court has power to adjudicate in civil and criminal matters which are brought before the Court*. In criminal trials the High Court is empowered to pass sentence according to law ...'. See judgment of Ajaib Singh J in *Public Prosecutor v Yee Kim Seng* [1983] 1 MLJ 252. Similarly, Tun Mohamed Suffian, in his book, *An Introduction to the Constitution of Malaysia* (2nd Ed) at page 97, states, '(c) its judicial power (ie the power to hear and determine disputes and to try offences and punish offenders) which is vested by Article 121(1) ...'.
>
> In my opinion both the definitions given above are too restrictive. In *Minister of Home Affairs v Fisher* [1980] AC 319 at p 329, the Privy Council held that the Constitution should be interpreted with less rigidity and greater generosity than other acts of Parliament. The Constitution must not be construed in any narrow and pedantic sense. See decision of the Privy Council in *James v Commonwealth of Australia* [1936] AC 578 614. The principles of constitutional interpretation as enunciated by the Privy Council in the two cases just cited have been applied in *Merdeka University Bhd v Government of Malaysia* [1981] 2 MLJ 356. Bearing in mind the principles of constitutional interpretation as laid down in those cases, it is proposed to state the meaning of the words 'judicial power of the Federation' as contained in art 121(1) of the Constitution.

In my opinion, the term 'judicial power' used in art 121(1) means, to borrow the words of Griffith CJ in the Huddart's case, '... the power which every sovereign authority must of necessity have to decide controversies between its subjects or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin ...' until the court, which has the power to give a binding and authoritative decision is called upon to take action. In the context of criminal law, the court possesses the judicial power to try a person for an offence committed by him and to pass sentence against him if he is found guilty. *Judicial power includes*:

(1) the power to accept a plea of guilty after the charge has been explained to the accused and he understood it, *Heng Kim Khoon v Public Prosecutor* [1972] 1 MLJ 30; *Munandu v Public Prosecutor* [1984] 2 MLJ 82; *Wong Sin Yeow v Public Prosecutor* [1968] 1 MLJ 230; and *Public Prosecutor v Jamalul Khair* [1986] 2 MLJ 371;

(2) the power to allow or refuse a plea to be retracted and that power must be exercised judicially, *Yeoh Eng Hock v Public Prosecutor* [1968] 1 MLJ 85;

(3) the power to grant or refuse bail to an accused person, *Chinnakarappan v Public Prosecutor* [1962] MLJ 234 and *Public Prosecutor v Latchemy* [1967] 2 MLJ 79;

(4) the power to grant or refuse a postponement, *Tan Foo Su v Public Prosecutor* [1967] 2 MLJ 19; and

(5) the power to transfer any proceedings to any other court or to or from any subordinate Court. See item 12, Schedule to Courts of Judicature Act 1964. (Emphasis added.)

[35] The above decision in *Dato' Yap Peng* was later affirmed by the then Supreme Court. It is apposite to examine the two cases cited in *Dato' Yap Peng* relating to the power to grant or refuse bail to an accused person. In the case of *Chinnakarappan v Public Prosecutor* [1962] 1 MLJ 234, it was held that a magistrate had no power to grant bail in cases punishable with death or life imprisonment and that the magistrate in refusing to grant bail had exercised his discretion properly. The relevant provision under consideration there was s 388(1) of the Criminal Procedure Code ('the CPC') and the Criminal Justice Ordinance.

[36] Similarly in *Public Prosecutor v Latchemy* [1967] 2 MLJ 79 the issue under consideration was the provision where the court should not grant bail to a person charged with an offence punishable with death except where certain exceptions apply, the relevant provision being s 388(1) of the CPC. It was held that in deciding whether the exceptions applied, the discretion should be exercised sparingly and judiciously.

[37] Section 388(1) of the CPC reads:

388 When person accused of non-bailable offence may be released on bail

(1) When any person accused of any non-bailable offence is arrested or detained without warrant by a police officer or appears or is brought before a Court, he may be released on bail by the officer in charge of the police district or by that Court, but he shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life:

Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail.

[38] It will be noticed here that there is given to the court the foundation to exercise a discretion namely, whether or not to grant bail to the categories of persons stipulated within the proviso notwithstanding that there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life.

[39] The two cases cited in *Dato' Yap Peng* dealt with the judicial discretion or judicial powers exercisable under s 388(1) of the CPC.

[40] It is in this context that the reference to the exercise of bail as a judicial power in *Dato' Yap Peng* must be appreciated. In other words, s 388(1) of the CPC provided the foundation for the exercise of the courts judicial power and accordingly its discretion in respect of the grant of bail.

[41] But what if there is no power altogether given to consider bail or in other words there is simply no discretion to exercise in the circumstances?

[42] To put it yet another way, can the court pronounce on the constitutionality of a legislative provision where there is no foundation or basis laid for the exercise of judicial power?

[43] Whilst the decision in *Semenyih Jaya* in no uncertain terms held that judicial power is vested only in the court and no other body, that decision must also be understood in its proper context.

[44] The issue confronting the Federal Court in *Semenyih Jaya* was in respect of s 40D of the Land Acquisition Act 1960 ('the LAA') which provides that 'the amount of compensation to be awarded shall be the amount decided upon by the two assessors'.

[45] The issue therefore was whether this effectively usurps the power of the court in allowing persons other than the judge to decide on the reference before it. After examining art 121 of the FC, the Federal Court against this background declared s 40D of the LAA unconstitutional.

[46] The Federal Court's objection to s 40D of the LAA emanates from the fact that non-qualified persons and non-judicial personages have been entrusted the power to exercise a judicial power in place of the judge.

[47] The following passage in the *Semenyih Jaya* case will best illustrate this:

> Meanwhile, our view is that *sub-ss 40D(1) and (2) of the Act, ignores the role of judges as defenders of the Constitution and renders the constitutional guarantee of adequate compensation illusory since judges 'abdicate' their constitutional role, for the guarantee of adequate compensation is now in the hands of two lay assessors*.
>
> [112] Thus, within the ambit of arts 13 and 121 of the Federal Constitution, the premise of a constitutional challenge is art 4(1) of the Constitution.
>
> [113] By virtue of art 4(1) of the Federal Constitution, this court may hold the provisions of any law passed after Merdeka as void and of no effect if such laws are inconsistent with the Federal Constitution.
>
> [114] *Our Federal Constitution affirms the polemic that judicial power is exercisable only by judges sitting in a court of law; and that the judicial process is administered by them and no other.*
>
> [115] For all the reasons above, we find s 40D of the Act to be ultra vires the Federal Constitution and that it should be struck down. (Emphasis added.)

[48] Thus, while s 40D of the LAA provided the basis or laid the foundation for the award of compensation, at the same time it removed from the judge the power to exercise the discretion in respect of compensation and placed it in the hands of the assessors instead.

[49] Similarly, in *Dato' Yap Peng*, s 418A of the CPC purported to empower the public prosecutor to issue a certificate requiring the sessions court to remove a case to the High Court even though a trial had already begun in the sessions court in that evidence had already began to be adduced.

[50] It was in that context that Zakaria Yatim J (as he then was) held that s 418A encroaches upon the judicial power of the Federation, which under art 121(1) is vested in the courts and therefore declared s 418A of the CPC unconstitutional.

[51] The prosecution attempted unsuccessfully to argue in *Dato' Yap Peng* that the decision of the Supreme Court in *Savrimuthu v Public Prosecutor* [1987] 2 MLJ 173 allowed the transmission of a case under the Dangerous Drugs Act 1952 ('the DDA') from the sessions court to the High Court following a requisition made by the public prosecutor under s 41A of that Act.

[52] An examination of the following passage in *Dato' Yap Peng* however will illustrate the difference between the two sections:

That section is entirely different from section 418A of the Criminal Procedure Code. Section 41A states:

> Where any case in respect of an offence under this Act is triable exclusively by the High Court or is required by the Public Prosecutor to be tried by the High Court, the accused person shall be produced before the appropriate subordinate court which shall, after the charge has been explained to him, transmit the case to the High Court without holding a preliminary inquiry under Chapter XVII of the Criminal Procedure Code, and cause the accused person to appear or be brought before such Court as soon as may be practicable. (Emphasis added.)

In Savrimuthu's case the Supreme Court held that the transmission of a case from the Sessions Court to the High Court was proper provided that the trial had not begun in the Sessions Court that is to say evidence had not begun to be adduced.

Section 418A, on the other hand, empowers the Public Prosecutor to issue a certificate requiring the Sessions Court to remove a case to the High Court even though a trial has begun in that Court that is to say evidence has begun to be adduced. (Emphasis added.)

[53] It will be readily apparent that the notable difference is that while s 41A of the DDA allowed a transfer before the trial had begun, s 418A of the CPC allowed the public prosecutor to effect a transfer once the trial had already begun.

[54] This subtle but important distinction demonstrates that once a matter reaches the doors of the court, it cannot be then removed from the jurisdiction of the court seeking to exercise its judicial power by placing that power in the hands of a non-judicial personage.

[55] In *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* the issue concerned the interpretation of art 121(1A) of the FC, in particular whether the clause had the effect of granting exclusive jurisdiction on the Syariah Court in all matters of Islamic Law including those relating to judicial review.

[56] It was held by the Federal Court that the jurisdiction to review the actions of public authorities, and the interpretation of the relevant state or federal legislation as well as the Constitution, would lie squarely within the jurisdiction of the civil courts. This jurisdiction could not be excluded from the civil courts and conferred upon the Syariah Courts by virtue of art 121(1A) of the FC.

[57] It was also held that it was clear that cl (1A) of art 121 did not prevent civil courts from continuing to exercise jurisdiction in determining matters under federal law, notwithstanding the conversion of a party to Islam.

[58] It was held in the ultimate analysis that the High Court was seised with jurisdiction, to the exclusion of the Syariah Court, to hear the matter, and had rightly done so.

[59] The Federal Court's reasoning was that the power of judicial review which is a judicial power is an essential feature of the basic structure of the FC and that features in the basic structure of the FC cannot be abrogated by Parliament by way of constitutional amendment.

[60] *Indira Gandhi a/p Mutho* concerned therefore a jurisdictional question of whether the Syariah Court had certain powers to the exclusion of the civil courts, in particular, the power of judicial review.

[61] Again, the situation here concerned the exercise of a discretion vested in the civil courts but purportedly contended to be the exclusive jurisdiction of another body. The point being that the power to exercise such discretion existed in the first place.

[62] In *Jimmy Seah Thian Heng & Ors v Public Prosecutor* [2019] 7 MLJ 308; [2018] 6 AMR 345, the issue was whether such categories of persons except those who are charged with an offence under Chapter VIA of the Penal Code (Act 574) and the Special Measures Against Terrorism in Foreign Countries Act 2015 (Act 770), may be released on bail subject to an application by the public prosecutor that the person be attached with an electronic monitoring device in accordance with the CPC.

[63] It was held that a literal reading of the section would produce a manifest absurdity in that it would appear that bail can only be granted by the court if and when the public prosecutor makes an application for an electric monitoring device.

[64] In the premises, it was held that pursuant to s 13 of the SOSMA, the courts are vested with the discretion to decide whether or not to grant bail to any of the classes of persons enumerated in sub-s (2) and the court when exercising such discretion, can impose whatever conditions of bail it deems fit including considering an application from the public prosecutor for the attachment of the electric monitoring device.

[65] It was also held that should the public prosecutor decide not to apply for the electric monitoring device, the court can nevertheless proceed to grant bail on whatever other terms and conditions.

[66] The common thread running through all these cases was that the foundation for the exercise of the judicial power was in existence and the substratum laid except that the terms of the exercise of that discretion was circumscribed in that the exercise of the power was placed in the hands of third parties and not the courts.

[67] In *Semenyih Jaya*, that person was the assessor, in both *Dato' Yap Peng* and *Jimmy Seah* it was the public prosecutor while in *Indira Gandhi* it was the Syariah Court.

[68] *Semenyih Jaya* in its analysis of what amounts to 'judicial power' held as follows:

> [59] Judicial power *is the power every sovereign state must of necessity have, to decide controversies between its subjects or between itself and its subjects, whether the rights related to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give an authoritative decision which is binding (whether subject to appeal or not) is called upon to take action* (see *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2011] 1 MLJ 158 at p 237; [2010] 7 CLJ 397 at p 485).
>
> [60] Judicial power is best described in *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311; [1987] 1 CLJ 550, as being *the power vested in the court to adjudicate on civil and criminal matters brought to it* (see also the dissenting view of Richard Malanjum CJ (Sabah and Sarawak) in *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1).
>
> ...
>
> [64] The phrase 'the judicial power of the Federation shall be vested' was taken by the framers of our Constitution from s 71 of the Australian Constitution (see the decision of the Court of Appeal in *Kok Wah Kuan v Public Prosecutor* [2007] 5 MLJ 174; [2007] 4 CLJ 454). *The phrase was interpreted by Griffith CJ in Huddart, Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330*, to mean:*
>
> > *... the power which every sovereign authority must of necessity have to decide controversies between its subjects, or beween itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision ... is called upon to take action.*
>
> [65] This definition was cited with approval by the Privy Council in *Shell Co of Australia, Ltd v Federal Commissioner of Taxation* [1930] All ER Rep 671; [1931] AC 275. (Emphasis added.)

[69] It is seen from the above passage that in defining the phase 'judicial power', it was held that the exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision is called upon to take action.

[70] This power must accordingly derive its source from somewhere for example, an Act of Parliament although this not the sole source. Hence my earlier observation that law cannot exist in a vacuum. It is also necessarily follows that the exercise of a discretion can only begin where such discretion has been accorded in the first place.

[71] The point I am making here is that the exercise of judicial power does not begin until and unless the court is called upon to do so. In s 13 of the SOSMA concerning persons charged with offences relating to terrorism, the court is simply not called upon to take any action.

[72] This is because the foundation or substratum for the exercise of that power is not there in the first place. It is axiomatic therefore that a substratum of laws must first exist before the edifice of judicial authority may be erected thereupon. Otherwise, the question of removing judicial power does not arise.

[73] Therefore while I agree with my learned brother in *Saminathan Ganesan* that the principle enunciated in *Semenyih Jaya* is that any legislation that seeks to remove from the courts any judicial power cannot be countenanced as this would be wholly inimical to the doctrine of the separation of powers, I respectfully differ that such judicial power exists where there is no substratum or foundation laid for the exercise of such power.

[74] Under all the circumstances, I find that there was no basis or foundation for the exercise of judicial discretion in respect of bail in the case of those persons charged with offences relating to terrorism under s 13 of the SOSMA.

Separation of powers

[75] My other concern is whether the court in declaring a provision in a statute unconstitutional where no foundation is laid or exists, will find itself encroaching upon the doctrine of separation of powers which since the advent of *Semenyih Jaya* remains very much an integral part of the FC?

[76] If the propositions enunciated in *Semenyih Jaya* are not understood in its proper context but taken to the extreme the danger is that the courts themselves might be guilty of encroaching upon the principle of the separation of powers.

[77] The separation of powers doctrine is too well known to embark upon an explanation of its meaning. Suffice to say that it operates as a necessary check and balance between the three branches of government so that one branch does not encroach upon the powers of the other and every organ keep within its proper confines and limits.

[78] Therefore, in as much as it is the function of the judiciary to interpret laws, it is also as much a function of the legislature to pass laws. These pieces of legislation passed have been debated and have gone through readings before receiving the Royal Assent.

[79] Much of these legislation have been passed with a particular objective in mind and most are based upon certain information not made available to the court.

[80] No doubt, the powers of the legislature are not without limit but in a civilised framework of a modern democracy, it surely must be within the province of the legislature to pass legislation in order to address a particular mischief.

[81] I am of the view therefore that the court by declaring a particular law unconstitutional where no substratum to exercise a discretion amounting to judicial power is given in the first place, may well find themselves transgressing against the limits and boundaries implicit in the FC and in so transgressing encroaches into the power of law making by the legislature and consequently offending the separation of powers doctrine. This could not have been what the framers of our constitution had intended.

[82] Any remedy, should popular opinion feel that such a law is draconian, lies in an amending Act of Parliament.

Section 13 of the SOSMA passed in accordance with law

[83] It is trite that there is a presumption of constitutionality in every legislation passed by Parliament. See *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116, *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566 and *Ooi Kean Thong & Anor v Public Prosecutor* [2006] 3 MLJ 389. The burden therefore rests upon the party seeking to displace that presumption.

[84] It is apposite to bear in mind that the SOSMA is a piece of adjectival law and does not create a substantive offence. I do however accept that the 'right to life' in art 5 does encompass both adjectival and substantive law. However, even the fundamental liberties enshrined in the FC are not without limits but expressed to be 'save in accordance with law'.

[85] In the book *Our Constitution* by Professor Shad Saleem Faruqi, published by Sweet & Maxwell Asia, the learned author stated that the need for the curtailment of fundamental rights by legislation is recognised, for example, against subversion, enacted under art 149 or legislation to combat an

emergency law which may suspend all fundamental rights except freedom of religion. Constitutional amendments may also be enacted to curtail or abolish a right guaranteed by the basic law.

[86] In fact the learned author stated that the chapter on fundamental liberties authorises Parliament to restrict fundamental rights on many grounds including public order and national security albeit recognising that the constitution was drafted against the backdrop of the communist insurgency and the legitimate concern for security and stability.

[87] It must not be lost sight of that the SOSMA was enacted pursuant to art 149 of the FC which reads:

> 149 Legislation against subversion, action prejudicial to public order, etc.
>
> (1) *If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation —*
>
> (a) to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property; or
>
> (b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or
>
> (c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or
>
> (d) to procure the alteration, otherwise than by lawful means, of anything by law established; or
>
> (e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or
>
> (f) *which is prejudicial to public order in, or the security of, the Federation or any part thereof,*
>
> *any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of Parliament;* and *Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.*
>
> (2) A law containing such a recital as is mentioned in Clause (1) shall, if not sooner repealed, cease to have effect if resolutions are passed by both Houses of Parliament annulling such law, but without prejudice to anything previously done by virtue thereof or to the power of Parliament to make a new law under this Article. (Emphasis added.)

[88] Article 149 therefore validates laws passed notwithstanding that it is inconsistent with any of the provisions of arts 5, 9, 10 or 13. Of particular relevance to the discussion at hand are arts 5 and 9 of the FC.

[89] Article 5 expresses that no person shall be deprived of his life or personal liberty save in accordance with law while art 9 guarantees freedom of movement but subject to any law relating to the security of the Federation or any part thereof, public order, etc.

[90] It will be noticed therefore that the fundamental liberties enshrined in the FC are not absolute and can be taken away by the passing of validly enacted law pursuant to art 149.

[91] That validly enacted law in the present context is the particular provision in s 13 of the SOSMA which absolutely prohibits the grant of bail to persons charged with committing acts of terrorism.

[92] It cannot be disputed that under art 4(1) of the FC power is vested in the court to strike down any law which is inconsistent with the Constitution. It reads as follows:

> 4 Supreme Law of the Federation
>
> (1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

[93] However, it is also important to note that such a law may be struck down as void only if it is inconsistent with the FC. Since SOSMA was enacted pursuant to art 149 which stipulates that the passing of any law is valid notwithstanding that it is inconsistent with any of the provisions of arts 5, 9, 10 or 13 which relate to certain fundamental liberties, the provisions of SOSMA are therefore valid.

[94] In *Alma Nudo Atenza v Public Prosecutor and another appeal*, the Federal Court held by way of general observation, as follows:

> [97] Article 5(1) of the FC reads:
>
> *No person shall be deprived of his life or personal liberty save in accordance with law.*
>
> [98] In our view *art 5(1) is the foundational fundamental right upon which other fundamental rights enshrined in the FC draw their support. Deprived a person of his right under art 5(1) the consequence is obvious in that his other rights under the FC would be illusory or unnecessarily restrained.* In fact deprivation of personal liberty impacts on every other aspect of human freedom and dignity (see *Maneka Gandhi v Union of India* [1978] AIR 597). *But at the same time art 5(1) is not all-encompassing and each right protected in Part II has its own perimeters. Hence, the provisions of the FC should be read harmoniously. Indeed the fundamental liberties provisions enshrined in Part II of the FC are parts of a majestic, interconnected whole and not each as lonely outposts*. (Emphasis added.)

[95] Those very parameters spoken of are enshrined in art 149 of which s 13 of the SOSMA is a by-product. It logically follows then reading the provisions of the FC in a harmonious fashion, that the provisions of the SOSMA in particular s 13 are valid and are not ultra vires art 121(1) of the FC.

Equality before the law

[96] Article 8 of the FC provides that all persons are equal before the law and entitled to the equal protection of the law. Article 8(1) guarantees fairness in all forms of state action. See *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261.

[97] In *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301, it was held:

> The effect of art 8(1) is to ensure that legislative, administrative and judicial action is objectively fair. It also houses within it the doctrine of proportionality which is the test to be used when determining whether any form of state action (executive, legislative or judicial) is arbitrary or excessive when it is asserted that a fundamental right is alleged to have been infringed.

[98] *Lee Kwan Woh v Public Prosecutor* adopted the doctrine of proportionality test propounded in *Om Kumar & Ors v Union of India* AIR 2000 SC 3689. In *Alma Nudo Atenza*, it was held:

> In other words, art 8(1) imports the principle of substantive proportionality. '*Not only must the legislative or executive response to a state of affairs be objectively fair, it must also be proportionate to the object sought to be achieved*' (see *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* at para 8. The doctrine of proportionality housed in art 8(1) was lucidly articulated in *Sivarasa Rasiah* at para 30:
>
> > *... all forms of state action — whether legislative or executive — that infringe a fundamental right must (a) have an objective that is sufficiently important to justify limiting the right in question; (b) the measures designed by the relevant state action to meet its objective must have a rational nexus with that objective; and (c) the means used by the relevant state action to infringe the right asserted must be proportionate to the object it seeks to achieve*. (Emphasis added.)

[99] The preamble to the SOSMA reads:

> *WHEREAS action has been taken and further action is threatened by a substantial body of persons both inside and outside Malaysia —*
>
> (1) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property;
>
> (2) to excite disaffection against the Yang di-Pertuan Agong;
>
> (3) *which is prejudicial to public order in, or the security of, the Federation or any part thereof*; or

(4) to procure the alteration, otherwise than by lawful means, of anything by law established; (Emphasis added.)

[100] SOSMA being enacted pursuant to art 149 of the FC allows laws to be passed with the objective of preventing action which is prejudicial to public order in, or the security of, the Federation or any part thereof notwithstanding that these laws are inconsistent with any of the provisions of arts 5, 9, 10 or 13 all of which relate to fundamental liberties.

[101] No doubt art 8 is not listed as one of the fundamental liberties that may be restricted pursuant to any laws passed under art 149.

[102] Notwithstanding, it can quite clearly be seen that there is a reasonable co-relation between the preamble to the SOSMA, one of which is to combat action prejudicial to public order in, or the security of, the Federation or any part thereof and the similarly desired objective envisaged by art 149(1)(f) in particular.

[103] Therein therefore lies the rationale and the justification for the difference in the treatment of the various classes of persons described in s 13 of the SOSMA. To put it another way, the curtailment of freedom by the absolute prohibition of bail in s 13 is not out of proportion to the object to be achieved namely, the prevention of action prejudicial to public order in, or the security of, the Federation or any part thereof.

[104] This exercise necessarily involves a balancing of different rights and interests and in this regard, it is apposite to cite the following passage in *Alma Nudo Atenza*:

> Proportionality is an essential requirement of any legitimate limitation of an entrenched right. Proportionality calls for the balancing of different interests. In the balancing process, the relevant considerations include the nature of the right, the purpose for which the right is limited, the extent and efficacy of the limitation, and whether the desired end could reasonably be achieved through other means less damaging to the right in question (see *State v Makwanyane* [1995] 1 LRC 269 at p 316).

[105] It surely cannot be seriously disputed that acts of terrorism in general have the capacity to occasion grievous harm and potential damage and loss both to property, life and limb.

[106] This is the very reason why preventive and not reactive action ought to be taken to address such risks. To take an extreme but not so far-fetched example, imagine the consequences, if explosives were to be placed in a shopping mall with the intention that it would be set off.

[107] Do the authorities then wait until much loss of life is occasioned and then endeavour to apprehend the offenders and revoke their bail previously given? To do so would be to proverbially close the stable doors after the horses have bolted. If this is not to be the case, the legislature must surely be empowered to pass laws designed to avert such tragedy from occurring.

[108] The particular objective to be achieved is therefore not out of proportion to the state action taken which is to prevent possible terrorist related acts by the absolute prohibition of bail. After the carrying out of a balancing exercise between the individual right of the accused and the greater good of the public at large it was necessary in all the circumstances for Parliament to pass such a law. There is also a clear rational nexus between the relevant state action with the objective to be achieved.

[109] In the case of *Alma Nudo Atenza*, the provision in s 37A of the DDA which allowed the use of double presumptions to be used against an accused was held to be disproportionate to the legislative objective that it served and therefore struck down as unconstitutional. As demonstrated, this is unlike the case at hand.

[110] I therefore find under all the circumstances that the enactment of s 13 of the SOSMA passes the ultimate test of proportionality and does not offend the principle of equality enshrined in art 8 of the FC and is consequently not ultra vires art 8 of the FC.

Presumption of innocence

[111] Learned counsel for the accused will no doubt submit that the absolute denial of bail would offend against the presumption of innocence of an accused. This part of the analysis is also relevant to the right to equality under art 8 of the FC.

[112] The answer to this in my view can be found in the judgement in *Alma Nudo Atenza v Public Prosecutor and another appeal* as follows:

> [124] Be that as it may, *a provision which violates the presumption of innocence may still be upheld if it is a reasonable limit, prescribed by law and demonstrably justified in a free and democratic society*. In this exercise, *the Canadian Supreme Court in R v Oakes elaborated on the two central criteria that must be satisfied*, at paras 69–70:
>
> (a) *the objective must be of sufficient importance to warrant overriding a constitutionally protected right. The objective must relate to pressing and substantial concerns; and*
>
> (b) *the means chosen to achieve the objective must be reasonable and demonstrably justified, in that:*

i *the measure must be rationally connected to the objective;*

ii *the right in question must be impaired as little as possible; and*

iii *the effect of the measure must be proportionate to the objective.*

[125] *It is clear therefore from the local and foreign authorities above that the presumption of innocence is by no means absolute*. However, as discussed above, derogations or limits to the prosecution's duty to prove an accused's guilt beyond a reasonable doubt are carefully circumscribed by reference to some form of proportionality test. We consider that the application of the proportionality test in this context strikes the appropriate balance between the competing interests of an accused and the state (see *Gan Boon Aun*). (Emphasis added.)

[113] The presumption of innocence which is often the reason cited for the grant of bail pending trial therefore is not without limits and the absolute prohibition of bail is nonetheless valid if it passes certain criteria central to the proportionality test which in this case is that the measure adopted was reasonably proportionate to the objective to be achieved.

Far reaching consequences

[114] Another valid concern is where the limit is to be drawn if the proposition in *Semenyih Jaya* is taken to its extreme?

[115] If the principle in *Semenyih Jaya* is not appreciated in its proper context, the effects are potentially far reaching. By way of analogy, if sentencing is to be construed as a judicial power without any limits, then there is in principle nothing to prevent a court from imposing life imprisonment upon a person convicted of drug trafficking under s 39B of the Dangerous Drugs Act 1952 ('the DDA') because the particular judge is of the view that the death penalty or the mandatory death penalty prescribed by s 39B(2) of the DDA is unconstitutional.

[116] By the same token, a judge passing sentence upon conviction of an accused for murder under s 302 of the Penal Code may take it upon himself to impose a sentence of life imprisonment instead of the mandatory death sentence because he or she is of the view that the mandatory death penalty is unconstitutional.

[117] Such action however would render meaningless the phrase 'sentence according to law'.

[118] This surely cannot reflect the true position as whatever personal convictions the individual judge might have, he can only pass sentence

according to law. I do not think that these far reaching consequences could have been what Semenyih Jaya had intended.

[119] The decision in *Saminathan a/l Ganesan* may also have the consequence of potentially opening the floodgates to a slew of applications for bail for those charged with other offences, for example, for drug trafficking under s 39B of the DDA notwithstanding the clear provision in s 41B of the DDA which reads:

> No bail to be granted in respect of certain offences
>
> (1) Bail shall not be granted to an accused person charged with an offence under this Act —
>
> (a) where the offence is punishable with death;
>
> (b) where the offence is punishable with imprisonment for more than five years; or
>
> (c) where the offence is punishable with imprisonment for five years or less and the Public Prosecutor certifies in writing that it is not in the public interest to grant bail to the accused person.
>
> (2) Subsection (1) shall have effect notwithstanding any other written law or any rule of law to the contrary.

[120] If it is held that s 13 of the SOSMA is unconstitutional, then s 41B of the DDA would suffer a similar death blow in time to come. Again, this would be contrary to the clear intention of Parliament.

[121] Section 41B of the DDA categorizes as unbailable those charged under the offence under s 39B of the DDA, which brings me into the next part of the analysis.

Unbailable offences

[122] One result of the decision in *Saminathan a/l Ganesan* is that the offence in respect of which the accused there has been charged which was previously unbailable is now rendered a non-bailable offence.

[123] Learned counsel for the accused submitted that the category of offences known as unbailable does not exist in the CPC but is a creation of common law and therefore all offences are either bailable or non-bailable.

[124] The net effect of learned counsel's contention, if true, is to effectively wipe out from the law the category previously known as unbailable offences.

[125] However, in the book *The Criminal Procedure Code, A Commentary*

(2nd Ed) by Srimurugan Alagan, published by Sweet & Maxwell, it is stated that unbailable or not bailable offences refer to offences for which an accused person cannot be released on bail as of right and the courts have no discretion to grant bail to the accused.

[126] One such provision in the unbailable category has been referred to above which is s 41D of the DDA. Another being cases under the Kidnapping Act 1961. The Firearms (Increased Penalties) Act 1971 also states that a person charged under the act shall not be granted bail.

[127] See however, the High Court decision of *Chow Lin Choy lwn Pendakwa Raya* [2010] 9 MLJ 813 which held that bail was nevertheless available for the latter mentioned offence, a decision that I respectfully find myself in disagreement with for the reasons expressed herein.

[128] *Mallal's Criminal Procedure* (7th Ed) LexisNexis, at p 659 para 1802, also states that the restriction on bail imposed by s 41B(1) of the DDA make the relevant offence unbailable at the moment the accused is charged.

[129] There is therefore on good authority a clearly recognised category of what is known as unbailable offences within the framework of our criminal procedure and jurisprudence.

Generalia specialabus non derogant

[130] If the arguments advanced by the parties are correct and s 13 of the SOSMA is ultra vires art 121(1) of the FC and therefore unconstitutional, this would mean that any application for the grant of bail would have to fall back under s 388 of the CPC.

[131] The effect of this contention however, would be to ignore the maxim, 'generalia specialibus non derogant', which means that a general Act is made subject to a specific Act.

[132] In *Public Prosecutor v Chew Siew Luan* [1982] 2 MLJ 119, the Federal Court held:

> We further note in particular that section 41B of the Act is an entirely new section introduced by the Dangerous Drugs (Amendment) Act 1978 (Act A426) and became operative on 10.3.78. *Generalibus specialia derogant is a cardinal principle of interpretation. It means that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law*. (See also *Public Prosecutor v Chu Beow Hin* [1982] 1 MLJ 135 at p 137). The provisions of section 3 of the Criminal Procedure Code which counsel for the respondent seeks to rely on has no relevance whatsoever to the matter in issue before us.

A It would be erroneous to apply expressions used and provisions made in one statute to another and entirely different one in complete disregard of the latter's express stipulations in the light of its specific purpose and object.

On the other hand, *it is a sound, and, indeed, a well-known principle of construction of a statute that the purport of words and expressions used in a legislative measure must take their colour from the context in which they appear. We do not therefore agree with the learned judge that it is open to a court to subject the express provisions regarding bail in section 41B of the Dangerous Drugs Act to the provisions relating thereto in the Criminal Procedure Code. The provisions regulating the granting of bail under the Dangerous Drugs Act must be construed in the context of that Act and not in that of the Criminal Procedure Code and to that extent the general provisions of the Criminal Procedure Code must ex necessitate yield to the specific provisions of section 41B of the Dangerous Drugs Act in that regard.* We should perhaps also observe en passant that any other construction would result in nullifying the purport and effect of the provisions of *section 41B(1)(c) of the Dangerous Drugs Act and render otiose and ineffective a certificate of the Public Prosecutor thereunder that it is not in the public interest to grant bail to a person accused of an offence under the Dangerous Drugs Act punishable with imprisonment for five years or less*. (Emphasis added.)

[133] It was therefore the clear and manifest intention of Parliament that the E bail provision in s 13 of the SOSMA was meant to prevail over the more general provisions of bail in s 388 of the CPC.

[134] The reason that the principle of the maxim, 'generalia specialibus non derogant' is alluded to here is to emphasise that there are certain specific pieces F of legislation designed to prevail over the more general provisions of law and these must be given full effect and the maxim must not be ignored as mere surplusage.

[135] It follows therefore that it is s 13 of the SOSMA that is applicable to G offences under that Act and not the provisions of the CPC when it comes to bail.

[136] In fact the scheme of the CPC itself makes provision for this in s 3 of the H CPC as follows:

3 Trial of offences under Penal Code and other laws

All offences under the Penal Code shall be inquired into and tried according to the provisions hereinafter contained, and all offences under any other law shall be inquired into and tried according to the same provisions: subject however to any I written law for the time being in force regulating the manner or place of inquiring into or trying such offences.

[137] It is noted that the provisions of the CPC will apply but subject to any written law for the time being in force which in this case is the SOSMA.

Decision

[138] In the final analysis therefore, and for the reasons expressed, I respectfully am constrained to differ from the decision of my learned brother in *Saminathan a/l Ganesan*.

[139] I accordingly find that the provision in s 13 of the SOSMA that absolutely prohibits bail for persons charged with an offence under Chapter VIA of the Penal Code which relates to terrorism and under which the accused stands charged, is constitutional and is not ultra vires art 121(1) or art 8 of the FC.

[140] In the premises, I need not go further and consider the merits of the bail application. The application is therefore dismissed.

Bail application dismissed.

Reported by Kohila Nesan